FILED
SEP 14 1983
ALEXANDER L. STEVAS

NO. 82-708

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES.

Respondents.

BRIEF OF RESPONDENT CITY OF LOS ANGELES

GARY R. NETZER,
Assistant City Attorney
Attorney for Respondent
CITY OF LOS ANGELES

Of Counsel:

IRA REINER, City Attorney
NORMAN L. ROBERTS,
Assistant City Attorney
1800 City Hall East
Los Angeles, California 90012
(213) 485-5414

The Brief Shop • Legal Printers • (213) 877-9630

QUESTION PRESENTED

Whether Congress intended that the confirmation of a Mexican land grant pursuant to the Act of 1851 to Ascertain and Settle the Private Land Claims in the State of California (9 Stat. 631) constitute a determination that public sovereign interest did not exist in the patented land?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
1. The Legislative Intent in Adopting the Act of 1851 was (1) to Separate Lands Already Owned by Private Persons from Those Lands Available for Sale or Donation to New Settlers; and (2) to Preserve to the Owners Their Rights Under Mexican Law but Give Such Owners No Additional Rights Greater Than Would Be Given to Owners of Land in the Other States.	9
2. Under Mexican Law the Title of the Grantees to Ballona Rancho Was Subject to Public Servitudes Which Previously Existed in Portions of the Rancho.	17
3. The Treaty of Guadalupe Hidalgo (1848) 9 Stat. 922) Was Not Intended to Enhance the Rights of Mexican Grantees in Their Land.	21
4. The Rights and Duties of Owners of Land Patented Under the Act of 1851, and the Incidents of Title in Such Land, Is Governed by State Law.	22

Page

5. The Patent Under the Act of 1851 Was a "Quitclaim" Only in the Sense that the United States Did Not Warrant the Title of the Patentee. Properly Construed, It Is a Confirmation of Previously Existing Title. As Either a "Quitclaim" or "Confirmation" it Did Not Pass Sovereign Rights. 27

6. This Case Involves Tidelands Presently Submerged, Not High Ground, Not Homes Nor Businesses. 30

7. The Ballona Lagoon Was Not Found by Commissioner Drummond to be "Pasture Land." Even if it Was Such a Finding and a Conclusion That the Land Was Not Subject to Any Public Rights Was Beyond His Jurisdiction. 33

CONCLUSION 37

TABLE OF AUTHORITIES

Case	Page
Barker v. Harvey (1901) 181 U.S. 481	9, 14, 20
Beard v. Federy (1866) 3 Wall (70 U.S.) 478	28
Boquillas Land & C. Co. v. Curtis (1909) 213 U.S. 339	28
Borax Consolidated Ltd. v. City of Los Angeles (1935) 296 U.S. 10	35
California v. United States (1982) 457 U.S. ____, 102 S.Ct. 2432	24
California Powder Works v. Davis (1894) 151 U.S. 389	25
City of Berkely v. Superior Court (1980) 26 Cal.3d 515, 162 Cal.Rptr. 327	31
City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 91 Cal.Rptr. 23, 476 P.2d 423	31
Crystal Springs L. & W. Co. v. City of Los Angeles (S.D. Calif. 1897) 82 F. 114, aff'd, Crystal Springs L. & W. Co. v. City of Los Angeles (1900) 177 U.S. 169	25

	Page
Devine v. City of Los Angeles (1906) 202 U.S. 313	26
Fremont v. United States (1855) 17 How (58 U.S.) 542	7, 24, 27
Humble Oil & Refining Co. v. Sun Oil Company (5th Cir. 1951) 190 F.2d 191	18
Kaiser Aetna v. United States (1979) 444 U.S. 164	32
Illinois Central Railroad Co. v. Illinois (1892) 146 U.S. 387	28, 29
Johnson v. Drew (1898) 171 U.S. 93	36
Jover y Costas v. Phillipine Islands (1911) 221 U.S. 623	18
Knight v. United Land States Association (1891) 142 U.S. 161	22
Lewis Blue Point Oyster Cultivation Co. v. Briggs (1913) 229 U.S. 82	29
Lux v. Haggin (1886) 69 Cal.255	18
Lyon v. California 454 U.S. 865	37
Mann v. Tacoma Land Co. (1894) 153 U.S. 273	10, 14
McBryde Sugar Co. v. Hawaii (1974) 417 U.S. 962	5

	Page
Montana v. United States (1981) 450 U.S. 544	11, 29
Moore v. Smaw (1861) 17 Cal. 199	24
Newhall v. Sanger (1876) 92 U.S. 761	10
Norton v. Larney (1925) 266 U.S. 511	35
Phillips v. Mound City Land & W. Assoc. (1887) 124 U.S. 605	25
Pruneyard Shopping Center v. Robins (1980) 447 U.S. 74	32
Robinson v. Ariyoshi (D.C. Hawaii, 1977) 441 F.Supp. 559	5
Shively v. Bowlby (1894) 152 U.S. 1	29
Sotomura v. County of Hawaii (1974) 419 U.S. 872	5
Sotomura v. Hawaii County (D.C. Hawaii, 1978) 460 F.Supp. 473	5
State Land Bd. of Oregon v. Corvallis Sand & Gravel Co. (1977) 429 U.S. 363	23
United States v. Castillero 2 Black (67 U.S.) 17	7, 26

	Page
United States v. Coronado Beach Co. (1920) 255 U.S. 472	20
United States v. 11.48 Acres of Land (5th Cir., 1954) 212 F.2d 853	5
United States v. Title Ins. Co. (1924) 265 U.S. 472	14
Wilcox v. Jackson (1839) 13 Pet. (38 U.S.) 498	19, 23, 24, 35

Statutes

California Public Resources Code: § 6308	4
Act of 1851 9 Stat. 631	2, 13, 22
An Act for the Relief of Thomas B. Valentine 17 Stat. 649	10
Treaty of Guadalupe Hidalgo (1848) 9 Stat. 922	21

Miscellaneous

Cong. Globe, 31st Cong. 2d Sess.	
p. 117, stmt. Sen Gwin	11
p. 349, stmt. Sen. Berrien	16
p. 359, stmt. Sen. Berrien	13

	Page
p. 363, stmt. Sen. Ewing	9
p. 373, stmt. Sen. Berrien	13
p. 375, stmt. Sen Berrien	15
p. 376, stmt. Sen. Foote	15
p. 387, stmt. Sen. Gwin	12
p. 389, stmt. Sen Dawson	14
p. 390, stmt. Sen. Clay	14
p. 405, stmt. Sen. Berrien	12

NO. 82-708

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES.

Respondents.

BRIEF OF RESPONDENT CITY OF LOS ANGELES

STATEMENT OF THE CASE

This case concerns a small watercourse located in the Venice-Marina del Rey area of the City of Los Angeles. The watercourse is an arm of the sea connected and subject to the tides of the Pacific Ocean, and navigable by shallow-draft craft. It was created by forces of nature. (Appendix to Petition, p. A-52. Finding of Fact 1.) Though development has altered much of the area around the lagoon, such work has not substantially affected the portion of the

original lagoon involved in this case. (Appendix to Petition p. A-52. Finding of Fact 2.)

The Ballona Lagoon is a part of the Rancho Ballona, a Mexican land grant patented under the provisions of the Act of 1851 (9 Stat. 631). In a letter by Commissioner Willis Drummond, which was a part of the proceedings leading to the patent, it is said with respect to a portion of the rancho: "The character of this estero, or inner bay . . . is testified to by Tomas Talamantes, Jose del C. Sepulveda and Ignacio Machado, who in substance say it is not an arm of the sea, and *that much of the tract represented as inner bay* is suitable for pasturage," and "this inner bay is not an arm of the sea." [Emphasis added.] (Joint Appendix, p. 92). 1/ This case does not concern the "inner bay." It concerns only the Ballona Lagoon. It concerns only land presently subject to tides and "innundated with seawaters at mean low-tide and mean high tide." (Findings of Fact 1, Appendix to Petition, p. A-52.)

The "inner bay" to which Commissioner Drummond refers is shown on the Survey of Rancho La Ballona (Joint Appendix, p. 26). The "inner bay" is one of two phrases used to describe what appears to be a water area in the survey. The area southwesterly of two small islands is described with the word "inlet."

Petitioners and amici in support of Petitioner have attempted throughout this proceeding to expand the litigation

---

1/ Petitioner inaccurately asserts that the California Supreme Court "believed that the "inner bay". . . was an 'arm of the Pacific Ocean' which had continually existed as such for more than 900 years. . . ." (Pet's. Br. p. 8) The quoted language is from the trial court's finding of fact based upon substantial and uncontradicted evidence.

to the entire "inner bay" and/or to other dry land in rancho grants in California. The California Supreme Court, however, expressly refused to decide the status of any other type of land than presently existing tideland. (Opinion, footnote 15, Appendix to Petition, p. A-16.)

Thereafter, Commissioner Drummond decided that the Hancock survey of 1858 was correct, and approved it. Respondents agree that the title of the lagoon is in the petitioner and the other owners. We contend, however, that the title to the lagoon is subject to public easements for navigation and fishing, recreation, and as a source of water for the adjacent and connecting canals.

The Ballona Lagoon has been used as a watercourse for and by the public in the manner and for the period of time necessary to create a prescriptive easement under California law (implied dedication); when the surrounding areas were subdivided the lagoon was delineated as a large lot in the subdivision usable only for waterway, and canals were connected to the lagoon and the lagoon was the source of water for the canals. (Findings of Fact 8, 9, 14 and 17, Appendix to Petition, pages A-53 - A-56.)

In 1965, City of Los Angeles filed an action to quiet title to navigation and fishery easements within the lagoon. This was in order to allow a small craft water system to be built and maintained in the canals, and furnish the owners who would use the system and lenders with a "marketable" record interest in the necessary water access route. The State of California was named as a defendant as required

by California law (Cal. Pub. Res. Code §6308) and answered and cross-complained. 2/

The trial court held that the Ballona Lagoon was subject to public easements, both state owned public trust easements because it was tideland created by forces of nature and also easements owned by "the public" because of the acts of the owners and public occurring during the twentieth century. (Conclusion of Law 2, Appendix to Petition, p. A-59.) The Supreme Court of the State of California affirmed the judgment of the trial court, but considered only the question of whether the lagoon was subject to the public trust easement. It did not discuss or consider the issue of dedication, as all of the dedicated uses "are included within the public trust" (Opinion, Appendix to Petition, p. A-17.) 3/

The petitioner appears to concede that land similar in characteristics to the Ballona Lagoon, and not located in a property originally patented under the Act of 1851, would be subject to the public trust easements. Only the

---

2/ At page 6 of its brief petitioner says the City sought "to avoid paying just compensation." Another way of describing the city's objective is that it was seeking permanent assurances that the public could continue to use the lagoon for navigation purposes as it had been doing for many years. To the exent petitioner implies something improper in the City's commencement of litgation, such implication is unwarranted.

3/ Should this Court determine that the public trust easement could not exist in the Ballona Rancho it should remand to the California Supreme Court for decision on whether the Ballona Lagoon is subject to easements created by prescription or implied dedication.

"peculiar" derivation of title causes the Ballona Lagoon to be treated differently than other land in California. 4/ Therefore, the practical question presented in this case is whether a title to land derived from the Mexican government, and confirmed by the Act of 1851, should have different attributes and be subject to lesser burden than land derived from other federal grants and patents. 5/

4/ Pacific Legal Foundation has launched an attack upon the California Supreme Court and apparently seeks to have this court declare unconstitutional all of the recent decisions of the California Supreme Court which are based on public trust theory. It appears to assert the California Supreme Court has committed inverse condemnations by its opinions. We question the authority the foundation cites. Both ***Robinson v. Ariyoshi***, (D.C. Hawaii, 1977) 441 F.Supp. 559 and ***Sotomura v. Hawaii County*** (D.C. Hawaii, 1978) 460 F.Supp. 473 were decisions where the district court, in collateral suits, held the Supreme Court of Hawaii had made erroneous decisions. Your Court had previously denied petitions for writs of certiorari and dismissed the appeals in both cases. (***McBryde Sugar Co. v. Hawaii*** (1974) 417 U.S. 962, ***Sotomura v. County of Hawaii*** (1974) 419 U.S. 872.) No appeals were prosecuted from the district court decrees. The district court does not have appellate jurisdiction over cases arising in the state courts. The decisions are so strange as to not be considered as valid precedent.

5/ Petitioner and its amici repeat over and over that the public trust easment is "broad," "absolute" (Pet. Br. p. 11) and "pervasive" (Brief of Solicitor General, pp. i and 4) the "functional equivalent of title." (Brief of California Land Title Assoc. p. 24.) They are thereby attempting to establish that a public trust easement is title, not an encumbance. In this they are incorrect. (See ***United States v. 11.48 Acres of Land*** (5th Cir., 1954) 212 F.2d 853, 855 in which the court recognized that the United States had an obligation to pay just compensation for taking of a fee simple absolute title in tidelands even though the land was subject to a navigation easement before taking.)

SUMMARY OF ARGUMENT

The argument presented in this brief is in seven parts plus a Conclusion. They are as follows:

1. Congress never intended to change the general rule relating to construction of grants of land from the United States for confirmation of Mexican grants under the Act of 1851. It intended only to make lands in California available for donation to new settlers by separating out the privately owned lands. It was also intended to protect the rights of Mexican owners of land, but to give no new rights. This is clearly established by the statements of the Senators when debating the Act of 1851. The general rule with respect to federal grants of land, applicable to patents under the Act of 1851, is that federal laws control with respect to whether there was a grant and its boundaries. All other aspects of land ownership are determined in accordance with State law.

2. Under Mexican law the owners of Ballona Rancho had no property rights in the water covered areas subsequently confirmed to them. This was established by uncontested expert witnesses at trial. It is also the general civil law rule. Even though water covered lands were included within the rancho boundaries, the public and private rights were not conveyed away, as the grant was "without prejudice" to the traversing roads and servitudes. Though the subject of this action, the Ballona Lagoon, is an important geographic feature now, and if "reclaimed" a valuable property, it was not when granted and confirmed. It was then a minor part of a 14000 acre ranch.

3. The Treaty of Guadalupe Hidalgo, which the Act of 1851 was to implement, was intended only to protect property rights in existence, not to confer property rights in excess of those enjoyed in Mexico. Additionally, it provided that Mexicans would enjoy all the constitutional rights of Americans. Therefore, application of United States or California law to their property, which gives only limited rights to owners of water covered lands, is not a treaty violation.

4. United States law, from at least 1839 to the present, is that once title to real property in a state has passed from the United States, that property is subject to state law. That rule was applied very early to Act of 1851 proceedings in ***Fremont v. United States*** (1855) 17 How (58 U.S.) 542, 565. It was later applied to other Act of 1851 proceedings. Federal law determines only whether title has passed and the boundaries of the land.

With respect to an argument presented by the Solicitor General, the decision in ***United States v. Castillero***, 2 Black (67 U.S.) 17 was that your Court had jurisdiction to determine whether a mineral claim was valid for the purpose of separating the claimed lands from the public lands; it was not a decision that the Court had jurisdiction to determine whether a mineral claim burdened lands already determined to be in private ownership.

5. The description "quitclaim," used in many cases relating to grants under the Act of 1851 is accurate only in the respect that the United States does not warrant title to the property it donates or patents. "Confirmation" is a more accurate term. Donations, conveyances, or patents of land by the sovereign, when given under general laws, do

not convey tidelands or convey them subject to public rights. Under United States law, if applicable, the Ballona Lagoon would be subject to the same public rights found to exist by the California Supreme Court.

6. The petitioners have attempted to expand this case to include land presently not subject to the tides, but filled and improved with buildings. This case involves lands still subject to the tides. California has the authority to determine that such land is subject to a "public trust" easement. Contrary to the assertions of amici, the California Supreme Court has protected private interests in reclaimed tidelands which previously, though incorrectly, were conveyed into private ownership.

7. The decision of the Surveyor General was ambiguous. He described the "inner bay," which may or may not have included the area marked "inlet." The finding of the trial court that the Ballona Lagoon, which is the "inlet," is tideland in its natural condition is therefore not inconsistent with any finding of the Surveyor General. However, in any event, the decision of the Surveyor General, if construed to be a finding as to the existence or non-existence of public rights, was beyond his jurisdiction, and hence could not have a *res judicata* effect.

8. *Conclusion*. The public trust easement, though "broad," is not the equivalent of title. It does not take all the valuable rights of a private owner of tidelands. State law should be applied. Otherwise there are two classes of property in California, one applicable to lands patented by the United States under the Act of 1851; the other applicable to land patented by the United States under other laws.

ARGUMENT

I. The Legislative Intent in Adopting the Act of 1851 was (1) to Separate Lands Already Owned by Private Persons from Those Lands Available for Sale or Donation to New Settlers; and (2) to Preserve to the Owners Their Rights Under Mexican Law but Give Such Owners No Additional Rights Greater Than Would Be Given to Owners of Land in the Other States.

The Act of 1851, "an Act to Ascertain and Settle the Private Land Claims in the State of California," was fully debated in the Senate during the 31st Congress. (It was hardly debated at all in the House of Representatives, which relied upon the full consideration by the Senate.) One of its purposes, expressed over and over again in the debates, was to separate the "private lands from the public domain." (Statement by Senator Ewing, Cong. Globe, 31st Cong. 2d Sess. p. 363.) But this did not mean the Senate intended that the sovereign rights of the United States and the State of California be determined in proceedings under the Act. "Public domain" had and has a very special meaning. That meaning is stated in *Barker v. Harvey* (1901) 181 U.S. 481, 490 as follows:

> "'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in legislation of this country. 'The

> words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' (*Newhall v. Sanger* (1876) 92 U.S. 761, 763.)"

"Public lands," as that term is used in federal legislation, does not include tidelands, and unless a contrary intent is shown general legislation relating to public lands do not extend to tidelands. *Mann v. Tacoma Land Co.* (1894) 153 U.S. 273 involved a claim by the successor of Thomas B. Valentine. Mr. Valentine was a claimant to land in California granted to Juan Miranda by the Mexican government. Valentine's petition for confirmation of the grant was contested, and he withdrew his petition, intending to contest the title of the other claimant, Ortega, after the grant was confirmed. Ortega's claim was rejected, and the land claimed by Mr. Valentine was disposed of "like other public lands." Congress granted him relief (An act for the Relief of Thomas B. Valentine (1872) 17 Stat 649) and Mr. Valentine subsequently established that he was the lawful owner of the California land.

The relief was to allow him to claim an equal amount of land located elsewhere. He did so, claiming certain lands subject to the tides, that is " 'mud flats bare at low water' [which] are overflowed at high water at a uniform depth of from 2 to 4 feet by the waters of Commencement Bay, at the head of Pugent Sound, in Pierce County, state of Washington." (153 U.S. at 275)

His successor, Jacob Mann, sued to stop the land company from trespassing on these tidelands.

Your court affirmed that Mr. Mann did not receive any interest in these tidelands notwithstanding his certificate and claimed right to a patent. The court said at page 284:

> "It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the Act authorizing the Valentine script, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the script might be located on the unoccupied and unappropriated public lands, but the term 'public lands' does not include tide lands."

This rule of construction of public lands legislation is still in use today. It was utilized ***Montana v. United States*** (1981) 450 U.S. 544, 552 in determining that a conveyance to the Crow Indian Tribe did not include the bed of the Big Horn River.

The Senate was well aware when it debated the Act of 1851 that "public lands" referred only to lands subject to sale. The various senators made it clear that the separation of private from "public" lands was to permit the disposition of the public lands to the residents of California. The debate started out by Senator William H. Gwin from California stating (Cong. Globe, 3lst Cong. 2d Sess. p. 117):

> "There are a hundred thousand American citizens in that country [California] who have no land, and who are anxiously awaiting the determination of the private land claims, that they may settle on the public lands, and avail themselves of the donation or preemption law."

Senator Gwin repeated his statement of the intent of the act. He said later in the debate (Cong. Globe, 3lst Cong. 2d Sess. p. 387):

> "An immense majority of my constituents, and those who by their energy and industry have developed the resources of the country and made California the wonder of the world, have no land. They want homes. I wish to give them homes on the public domain, and that cannot be done until the good claims are confirmed and separated from the public domain, and the bad claims which hang like an incubus over the country, checking the energy and industry of its inhabitants, are rejected and put to rest forever."

This was also the objective of Senators from other states. Senator John M. Berrien, the chairman of the Judiciary Committee, which wrote the bill, said (Cong. Globe, 3lst Cong. 2d Sess. p. 405:)

> "The object is to separate the private from the public domain, with a view on the one hand to leave to individuals, having private claims capable of being ascertained, the undisturbed enjoyment of their property, and on the other to enable the Government to exercise its constitutional power of disposing of the public domain."

The Senate did not intend that confirmation proceedings determine who owned the "private lands," but only to separate them from the "public domain." This is made clear in the comments of Senator Berrien explaining the purpose of the bill. Senator Berrien expressed that he had

acquiesced in the view of some senators to leave the decision as to conflicting "private claimants" to the decision of the State tribunals, and concluded that the issuance of the patent would not decide that question. He said (Cong. Globe, 3lst Cong. 2d Sess. p. 359):

> "Thus if the legal title was vested in the United States, and the patent should emanate, the legal title would be transferred to the patentee; but if a better equitable title existed in another, that patentee would hold the legal title as a trustee for such other person."

Senator Berrien repeated this thought again (Cong. Globe, 3lst Cong. 2d Sess. p. 373):

> "The decision by the provisions of the law, operates only in favor of the real owner of the property; the decision is only established between the claimant and the United States, where the portion of the territory has been severed from the public domain, and the question of individual right is left open."

As we read the record of the Senate debate, the purpose of Section 13 of the Act of 1851 was to establish that the United States had the right to donate its land to the residents of California; lands to which claims had been rejected and lands not claimed within two (2) years were available for settlement by the new residents of California. When claims were allowed, such only established that the

patented lands were not public, but not the true or various ownership interests in them. 6/

The rights of private persons and the public to title, or to use of the patented areas, if there were such rights, continued to exist.

The other purpose of the act was to preserve to the Mexican grantees or other successors the rights they had under Mexican law and to give them the same rights as those enjoyed by the citizens of other states. This intent was also expressed several times in the debate. Senator Dawson said (Cong. Globe, 3lst Cong. 2d Sess. p. 389):

> "Let us pass no law to secure any class of men in the possession of their property. Let their titles be investigated according to the laws of Mexico, under which these people lived, and our own treaty."

"Senator Clay said (Cong. Globe, 3lst Cong. 2d Sess. p. 390):

> We are not to introduce new rules of property in behalf of the inhabitants of California, extending their land and enlarging their possessions.

6/ The cases of *Barker v. Harvey* (1901) 181 U.S. 481 and *United States v. Title Ins. Co.*, (1924) 265 U.S. 472 seem to be entirely at odds with the statements of Senator Berrien. To the extent the court determines that the opinions have relevance to this case, they should be overruled. The legislative history shows there was no intent to foreclose any person from claiming title or other interests against the patentee of a Mexican grant. This contention is fortified by the actions of Mr. Valentine described in *Mann v. Tacoma Land Co., (supra)*, 153 U.S. 273. He believed that if a rancho was patented to Ortega he could try the validity of Ortega's title as against his (Valentine's) title in the state court. This plan failed, however, because Mr. Ortega's claim was rejected, and the lands thereafter were disposed of by the United States.

> "We are bound to secure to them, by the treaty made with Mexico, exactly that property to which they are entitled by the laws of the country, whether Mexico, Spain or California, under which that property has been held."

That the Mexican grantees were not to be given an advantage over other citizens was declared quite forcefully by the senators. Senator Foote declared (Cong. Globe, 31st Cong. 2d. Sess. p. 376):

> ". . . I am unwilling to do more for the people of California than for the people whom I and other senators here represent."

Senator Berrien, also speaking on a proposed amendment to allow occupants of land to prove their title by evidence of occupation for a long period of time, which amendement he opposed, said (Cong. Globe, 31st Cong., 2d. Sess. p. 375):

> "Now, this law of prescription between individual and individual, which it is sought to introduce into this bill, would have given to the citizens of California a right which they would not have enjoyed under their own Government, if that Government had continued over them, and it would have given them a right which other citizens of the United States had not enjoyed as it relates to the United States."

The senator then went on to explain that the Judiciary Committee unanamously rejected giving to grantees of Mexican land more rights or privileges than they had under

either Mexican or United States law. The amendment was defeated. 7/

In adopting the Act of 1851 the Congress was not creating a new system of laws for the special benefit of grantees from Mexico in California. Senator Berrien explained (Cong. Globe, 31st Cong. 2d. Sess. p. 349):

> "The committee . . . have desired to offer a mode of proceeding similar to that which has been adopted in other cases of cessions of territory to the United States. The object of this proceeding is to separate the public from the private domain. . . . We have endeavored to walk in the steps of our predecessors."

We submit that the intent of the Act of 1851 was to give no more to Mexican grantees than to other citizens, consistent with protecting the property rights the Mexican grantees had received from their government. To the extent that general United States law and State of California law would not detract from property rights secured under Mexican law, such law is fully applicable to land titles derived from Mexico.

7/ At page 16 of his brief (Footnote 14) the Solicitor General "deems frivolous" the suggestion by the California Supreme Court that the United States would not convey to its own citizens lesser rights than it would convey to grantees from Mexico. Such disrespect for the California Supreme Court is unwarranted, even though the Solictor General disagrees with that court's opinion. Further, the California Supreme Court's opinion is certainly in harmony with the expressions by at least two senators that Californians get nothing more than the citizens of the other states.

2. Under Mexican Law the Title of the Grantees to Ballona Rancho Was Subject to Public Servitudes Which Previously Existed in Portions of the Rancho.

Finding No. 7 (Appendix to Petition, p. A-53-A-54) states that while subject to Mexican sovereignty, and under Mexican law, the grantees of the Ballona Rancho had no property interest in the Ballona Lagoon. This finding was based upon uncontested evidence, the testimony of Senor Federico Laffan, an attorney in practice in Mexico City, a witness called on behalf of Petitioner, Summa Corporation, and the testimony of Mr. Earl Weisbaum, an attorney at law and the foreign law librarian of the Los Angeles County Law Library, called by the City of Los Angeles. Much of their testimonies is reported at pages 194-223 of the joint appendix. We quote from Senor Laffan's testimony, petitioner's witness, elicited by petitioner's attorney. It is quite positive that under Mexican law no private property interest could exist in a body of water.

> "Because the applicable law which is the Las Siete Partidas states very clearly and in a limited way that running bodies of water, bays, the sea are not subject of private domain. That is to say that they are of the public domain, with the implication - if I may add - that the sovereign has no power to convey a property interest in such bodies of water." (Joint Appendix p. 223.)

This testimony by Senor Laffan is fully in accord with the statement of United States courts on the subject of civil

law and Mexican law. The California Supreme Court has said in ***Lux v. Haggin*** (1886) 69 Cal. 255, 316:

> By the Mexican law, the property in rivers pertained to the nation, the use to the inhabitants."

The United States Court of Appeal stated in ***Humble Oil & Refining Co. v. Sun Oil Company*** (5th Cir. 1951) 190 F.2d 191, 194:

> "Under the civil law, from the Institutes of Justinian until the present time, the seashore has been common property, and the alluvion that was added thereto belonged to the owners whose land was bounded by the sea. This precept of the Roman law remains today as the guiding principle in both civil and common law jurisdictions unless changed by code or statute. Thus the seashore is no part of the land but always an adjunct of the sea."

Petitioner in its brief contends that the limitations of Mexican law are irrelevant in this case because of the alleged "conclusiveness of the 1851 Act proceedings" (Pet. B. p. 16 n. 25). Only the Solicitor General asserts that the civil law would not have been applicable to the Ballona Lagoon. He does this on the authority of a case involving Spanish law in the Phillipine Islands (***Jover y Costas v. Phillipine Islands*** (1911) 221 U.S. 623.) But even if a decision on a Phillipine Islands land grant is applicable to this case, the case does not stand for the proposition that tidelands could be freely conveyed under civil law. ***Jover*** involved a grant of "marshy waste land" (p. 628) ***and no other land***. It was made on the express condition that the

land be reclaimed ("filled in") and during a 20 year period, one-third of the land was filled. Of such a grant, and of the law of Spain, this court said (p. 633):

> "Law 3 and 4, Title 28, Partida, 3 which affirm that the sea and its shore are among the things which are common to all men . . . did not forbid the granting of tidelands *for purposes of reclamation and improvements.*" [Emphasis added.]

Certainly, a common rancho grant, consisting of mainly high ground, could not be construed as having as its purposes "reclamation and improvement" of the Ballona Lagoon. Certainly such alleged purpose has not been satisfied - the Ballona Lagoon is water covered to this date. 8/

The petitioner, as well as amici in support of its position, take the view that the provision of the Mexican grant that enclosures are to be "without prejudice to the traversing roads and servitudes" cannot support a conclusion that the grant was subject to "reserved" public rights. Petitioner says: "Such a broad public property interest was plainly not withheld by the standard stipulation." (Pet. Br. p. 16 Ft nt 25.) In making this comment, petitioner ignores that the entire "inner bay" was approximately 2000 acres out of

---

8/ The Solicitor General suggest that the Mexican government officials did not always adhere to the law (pp.12 and 13). Neither did the officials of the United States government always do so. (See *Wilcox v. Jackson* (1839) 13 Pet. (38 U.S.) 498 where the land office register issued a certificate granting Fort Dearborn, an active army post, into private ownership.) It must be presumed that the Mexican courts would no more honor such a purported conveyance then would this court, which have held them to be void.

approximately 14000 acres (Joint Appendix, p. 32) (14.28 percent); and the Ballona Lagoon is only a small portion of the "Inner Bay." *The reservation did not and still does not take all the value of the Rancho*, but only a small portion of it, if any. In this respect it is no different than roadways — which involve an exclusive public use of the surface of a small portion of a parcel. This court has indicated that roads survived the grant and patent procedure (***Barker v. Harvey*** (1901) 181 U.S. 481, 499). The waters are not different, in kind or in quantity. Though a road easement or a "public trust" easement substantially diminish the private values and usefulness of the land they physically occupy; they are a benefit to the unencumbered remainder. 9/ The adjacent and nearby lands have value only because of accessabilty to roads and/or waterways.

California Land Title Association also ignores that only a small percentage of the ranch is, or ever was, water covered. "Vast areas of federally-patented Mexican Lands" are not affected by the opinion of the California Supreme Court, only those which are still subject to the tides in their natural condition.

Both Petitioner and the Solicitor General also assert that the servitude reservation has been held to be inapplicable to tidelands, citing ***United States v. Coronado Beach Co.*** (1920) 255 U.S. 472, 485. They miscite the case. Your court held that this reservation did not justify the taking of all of

---

9/ The Solicitor General appears to suggest that "a right to traverse on this land" is not, or cannot be, a public right. He is wrong. (Footnote 13, p. 14) The Solictor General's argument, if correct, would mean that the famous "Camino Real" between San Diego and San Francisco was a trespass.

North Island under a law of Mexico allowing the government to take lands for public buildings. The court did not use the phrase at all with respect to whether the United States had to pay compensation for taking a *fee interest* in the patented tidelands.

By the above argument we seek to establish that nothing would have been taken from the Mexican grantees if the Ballona Lagoon and other portions of the "Inner Bay" had been excluded in the patent. Nothing is taken from them and their successors by applying the law of the United States or of California to petitioner's title.

3. The Treaty of Guadalupe Hidalgo (1848) 9 Stat. 922) Was Not Intended to Enhance the Rights of Mexican Grantees in Their Land.

We have pointed out that the intent of the senators when adopting the Act of 1851, as expressed in debate, was to "secure [to the Mexican grantees] exactly that property to which they are entitled by the laws of [Mexico]." (Statement by Senator Clay, supra). This was the Senate's opinion of the duties of the United States under the Treaty of Guadalupe Hidalgo. We believe this construction of the treaty is correct.

Article VIII of the Treaty provides in part: "[P]roperty of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it

guaranties equally ample as if the same belonged to citizens of the United States." (Appendix to Petition, p. A-96). [10/] Nothing in Article VIII states or implies that Mexican property would have greater rights in California than granted either by Mexican or United States law. All that was intended to be changed was the government - the nation. Your court so stated in ***Knight v. United Land States Association*** (1891) 142 U.S. 161, 200-201 as follows:

> "Jurisdiction and sovereignty passed from one nation to the other by the cession, but not private rights of property; *their ownership remained as under the former government* . . . 'In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away.' " [Emphasis added.]

4. The Rights and Duties of Owners of Land Patented Under the Act of 1851, and the Incidents of Title in Such Land, Is Governed by State Law.

We believe we have established that Congress did not intend to confer any special rights or privileges upon the

---

10/ An argument may be made that the "inviolably respected" provision applied only to property of Mexicans who did not reside in California. As to residents of California, they were guaranteed the rights - property and otherwise - of United States citizens. We do not, however, make this argument, as we are confident that application of United States or California law to the Ballona Lagoon tidelands does not impair any Mexican property rights.

owners of land patented under the Act of 1851 or on the land itself. It intended, consistent with treaty obligation, that the people of California receive no more than the people of other states. Congress intended that the general rules of real property law apply to Mexican grantees.

The major general rule of United States real property law is that the law of the state in which the property is located establishes the incidents of and limitations to real property titles. This was the federal law in 1851, as declared by your court in *Wilcox v. Jackson* (1839) 13 Pet. (38 U.S.) 498, 517:

> "We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

That rule was repeated in *State Land Bd. of Oregon v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 377. It was also repeated but held not applicable in *California v. United States* (June 18, 1982) 457 U.S.____ [102 S.Ct.

2432], relating to whether the boundary of federally owned land moved as accretions occurred. [11/] Federal, rather than state law, was utilized to decide ***California v. United States*** because (1) The issue was one of boundary of the federally owned land and (2) The federal government was the litoral owner (See concurring opinion by Mr. Justice Rehnquist).

Thus, though not citing authority, your Court was following the ***Wilcox v. Jackson*** precedent when it held in ***Fremont v. United States*** (1855) 17 How. (58 U.S.) 542, 565:

> "In relation to that part of the argument which disputes his right, upon the ground that his grant embraces mines of gold or silver, it is sufficient to say, that under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. ***The only question before the court is the validity of the title.*** And whether there be any mines on this land, and if there be any, what are the rights of sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court by the act of 1851." [Emphasis added.]

That issue was later decided in a state court proceeding terminating in ***Moore v. Smaw*** (1861) 17 Cal. 199 utilizing State common law.

11/ In that case your court decided that federal law is to be utilized when boundaries are at issue. You said: "We reaffirm today that federal law determines the *boundary* of oceanfront lands owned or patented by the United States." (102 S.Ct. 2441) [Emphasis added.]

A later statement of the rule was made in *California Powder Works v. Davis* (1894) 151 U.S. 389, 395; quoting from *Phillips v. Mound City Land & W. Assoc.* (1887) 124 U.S. 605, 610:

> "Article VIII of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them . . . Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals."

On the authority of *California Powder Works*, among other cases, it has been held that the federal courts have no jurisdiction to determine the existence or nonexistence of water rights in land patented under the Act of 1851. In *Crystal Springs L. & W. Co. v. City of Los Angeles* (S.D. Calif. 1897) 82 F. 114, affirmed in *Crystal Springs L. & W. Co. v. City of Los Angeles* (1900) 177 U.S. 169, the district court said (p. 117):

> "Where the parties claim under Spanish or Mexican grants, confirmed and patented by the United States, and the controversy is only as to what were the rights acquired by the parties respectively, or their predecessors in interest, under the Spanish or Mexican governments, it being conceded that the rights so acquired, whatever they may have been, were included in the confirmation and quitclaimed through the patent of the United States, *federal jurisdiction does not exist*; and it is immaterial whether such rights were acquired through the original grants or transactions subsequent thereto." [Emphasis added.]

See also *Devine v. City of Los Angeles* (1906) 202 U.S. 313, 337.

These statements of jurisdiction are fully in accord with the intent expressed by the senators in the debates on the Act of 1851.

The Solicitor General suggests that this court has overruled these holdings of limited federal jurisdiction by its decision in *United States v. Castillero* (1862) 2 Black (67 U.S.) 17, 166-169). We believe the Solicitor General has confused a case where a person was claiming title by reason of his discovery of minerals with one where there is an objection that there could be no private title because of the existence of minerals. The majority of the court in *Castillero* points out that the claim is not only for the minerals, "but it also embraces, if necessary to the working of the mine, a right to the exclusive possession and use of the surface of the land for an indefinite period . . ." The court went on to say that though minerals were "regarded as severed from private land" by the usual conveyance "for agricultural or other ordinary purposes" (p. 166) they are still capable of being granted by the Crown, with the possible exception of "royal mines." Hence, a mineral right was "land." In no way may the decision be construed as an assertion that the federal court had jurisdiction when one claimed a mineral interest in another's land. A fuller explanation of this distinction is contained in the opinion of the district judge, which was included in Justice Wayne's dissent. The district judge points out at page 233:

> "It will be seen that the only question before the court was whether the fact that mines of gold and silver had been discovered on land which had

> been previously granted under the Colonization Laws, destroyed the title of the individual to the land granted. It was, of course, held that it did not. Whether there were any outstanding rights of sovereignty in such mines, and if so, what was their nature, and in what sovereign they were vested, the court declared itself without jurisdiction to determine.
>
> "But it was not decided, nor could it have intended to be decided, that a private grantee of a mine under Mexican law could not present his claim for confirmation under the Act of 1851."

Neither this court nor the district court perceived they were overruling *Fremont* by their respective opinions. The Solicitor General is in error in his claim.

We submit, as we have done before, that the decision in this case is a state court and state law matter, presenting no substantial federal questions, either under general federal property law or under the cases construing the Act of 1851.

5. The Patent Under the Act of 1851 Was a "Quitclaim" Only in the Sense that the United States Did Not Warrant the Title of the Patentee. Properly Construed, It Is a Confirmation of Previously Existing Title. As Either a "Quitclaim" or "Confirmation" It Did Not Pass Sovereign Rights.

The Petitioner and amicus California Land Title Association both cite the numerous cases decided by your court and the California Supreme Court holding that *title* to tidelands passed from the United States by a patent, and therefore California did not succeed to such *title*. Because of the use in many of these cases of the word "quitclaim" (See ***Beard v. Federy*** (1866) 3 Wall (70 U.S.) 478.) they assert that all rights of the United States passed to the grantee. "Quitclaim," if so construed, is a misdescription of the effect of the patent. As stated in ***Boquillas Land & C. Co. v. Curtis*** (1909) 213 U.S. 339, 344:

> "But, while it is true that in ***Beard v. Federy, supra***, Mr. Justice Field calls such a patent a quitclaim, we think it rather should be described as a confirmation in a strict sense . . . It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign, it intends or purports to enlarge the grant."

Justice Field would have agreed with this statement. He said, speaking for this court in ***Illinois Central Railroad Co. v. Illinois*** (1892) 146 U.S. 387, 453:

> "General language sometimes found in opinions of courts expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases."

This court has recognized the qualified and limited title granted by a prior sovereign to tidelands. Such grant

conveys a title subject to the public right of navigation and the right to improve and use such tidelands. (***Lewis Blue Point Oyster Cultivation Co. v. Briggs*** (1913) 229 U.S. 82, 87-88.) When the tidelands were not granted by a previous sovereign, but by the United States the rule is: "A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States." (***Montana v. United States*** (1981) 450 U.S. 544, 552,) This rule is so firmly established in our law that your court said in ***Shively v. Bowlby*** (1894) 152 U.S. 1, 57:

> "The United States, while they hold the country as a territory, having all the powers both of a national and of municipal government, may grant, for appropriate purposes, title or rights in the soil below high water mark of tide waters. But they have never done so by general laws: . . ."

This court held in ***Illinois Central Railroad Co. v. Illinois*** (1892) 146 U.S. 387, 453-460 that the State of Illinois could not grant navigable waters constituting the Chicago harbor free of a public navigation right. Though Congress may be able to grant navigable waters free of trust, it should not now - for the first time - be presumed to have done so by a "general law."

Though the Ballona Lagoon may not be navigable in the federal sense, it is tideland. It was a part of the Pacific Ocean in 1848 (see Finding 1, Appendix to Pet. p. A-52)

and it still is, being subject to the tides. The works of man in the vicinity has not substantially affected it.[12/] We do not believe that the Act of 1851 can be construed as authorizing the conveyance of all public rights in its waters or its use.

If federal law were controlling in this case, the result would be the same as that reached by the California Supreme Court.

6. This Case Involves Tidelands Presently Submerged, Not High Ground, Not Homes Nor Businesses.

Throughout the appellate process of this case, the petitioner and amici in support of petitioner have sought to expand the issues beyond those presented. They have been unwilling to litigate whether the public retains a right in tidelands included in a Mexican grant *which are still tidelands.* They have raised the specter over and over again of persons losing their homes and businesses. In the briefs filed herein, petitioner says at pages 10 and 11 of its brief "The 'public trust' property interest is held to exist by virtue, not of the present condition of land, but its historical character as tidelands in 1850 . . ." At page 12, it says: "It accordingly permits the State to utilize non-navigable and even dry land to the exclusion of the 'fee' owner." Amicus

---

12/ The Solicitor General, in a rather confusing footnote (Ftnt. 9, pp. 10-11) somehow concludes the lagoon has been dredged. Nothing in the findings justifies such an assumption. The findings are that the lagoon was "created by the forces of nature;" tidal influence was "protected and sustained," not "created." (Appendix to Pet. p. A-52.)

California Land Title Association speaks of "private marinas, single-family residence, high-rise condominiums, office buildings and commercial complexes." (p. 6).

As we point out above, only presently water covered land is involved in this case. The California Supreme Court refused to apply it to dry land or to advise what its ruling would be if a litigation were commenced involving reclaimed wetlands. But, it should be noted that the California Supreme Court has not in the past simply ignored the private expectations of owners of such lands. In ***City of Long Beach v. Mansell*** (1970) 3 Cal.3d 462, 91 Cal.Rptr. 23, 476 P.2d 423 the court said that the state and city were estopped to assert that certain tidelands to which the state originally held title still belonged to it because: ". . . ever since the development of the area began shortly after the turn of the century the state and (after annexation in 1923) the city have conducted themselves relative to the Section 2 (a) lands as though the said lands were private property wholly free from trust claims. In reliance upon this conduct thousands of citizens have settled upon these lands with the same expectations as citizens settling on other lands within the city." (p. 499) In ***City of Berkeley v. Superior Court*** (1980) 26 Cal.3d 515, 162 Cal.Rptr. 327, 606 P.2d 362 the California Supreme Court was faced with the question of how to treat tidelands which had been conveyed by the state in 1870, and still preserve private investment and honor private expectation. It did this by balancing the public and private interests; holding at pages 534-535:

> "Properties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels

> are not subject to tidal action. Tidelands that have been neither filled nor improved are not only the most suitable for continued exercise of trust uses, but because there is only a remote likelihood that these parcels may be filled [citations] the economic loss to the grantees of such lots is speculative at best and is clearly outweighed by the interests of the public."

It should be noted that one of the findings of the trial court is: "5. The Ballona Lagoon and the waters of the Ballona Lagoon are of scenic value to the community and enhance the aesthetics and value of adjacent properties . . . Properties adjacent or near the Lagoon have value and usefulness in excess of those separated from the Lagoon by distance." (Appendix to Petition, p. A-53.) Petitioner, by seeking to deny the right of the public to maintain - and perhaps improve - the lagoon are denying the right of their neighbors to continued enjoyment of the lagoon and its value. These neighbors are also successors to the patentees of the Ballona Rancho.

The State of California, and this includes its judicial system, has the authority "to define 'property' in the first instance." (***Pruneyard Shopping Center v. Robins*** (1980) 447 U.S. 74, 84.) This power is limited by the "taking" clause of the Fifth Amendment. But it is a broader power than that possessed by the United States. (See ***Kaiser Aetna v. United States*** (1979) 444 U.S. 164.) The petitioner and amici recognize and accede that the state may fully regulate the use of the Ballona Lagoon and its waters, including, we perceive, to prevent any economic use of them should this be in the public interest (See Solicitor General's brief,

p. 29.) It is hardly a taking of any magnitude, if at all, for the California court to say that the lagoon and its waters may also be used - in an affirmative sense - for public trust purposes as well as preventing inconsistent private uses.

Amici California Land Title Association and Pacific Legal Foundation accuse that the California Supreme Court "cannot reasonably be expected to exercise self-restraint" (Land Title Assoc. Brief, p. 12) and the court will continue to expand the public trust doctrine in "a sense of euphoria in its excitement" (Pacific Legal Fnd. Br. p.12). These are not only attempts to amici to litigate some future case, not this one, their predictions of the future are not borne out by the past actions of the California Supreme Court. The California Supreme Court has sought to preserve public rights in tidal and water covered properties against new incursions; it has not sought to take back that which was given and thereafter utilized.

7. The Ballona Lagoon Was Not Found by Commissioner Drummond to be "Pasture Land." Even if it Was Such, a Finding and a Conclusion That the Land Was Not Subject to Any Public Rights Was Beyond His Jurisdiction.

Again, we point out that this litigation concerns the "Ballona Lagoon," which, at most, is only a part of the "Inner Bay," and perhaps may not be a portion of it at all. The Plat of the Rancho Ballona prepared by Henry Hancock (Joint appendix, p. 26) shows an area marked

with the words "inner bay" separated from the "inlet" by two islands. The "inlet" represents the area now known as the "Ballona Lagoon." (See exhibit to Solicitor General's brief.) Commissioner Drummond states "This inner bay is not an arm of the sea." (Joint appendix, p. 92.) The phrase "inner bay" is ambiguous, it may or may not include the "inlet." This ambiguity is further increased because the testimony relating to the "inner bay" is that "*much of the tract* represented as inner bay is suitable for pasturage." [Emphasis added.] For this reason, in addition to the ambiguity discussed by the California Supreme Court (Appendix to Petition p. A-7), the statements in Commissioner Drummond's decision are not binding as a determination of the character of the Ballona Lagoon.[13/]

It is our primary position, however, that the description of the geography of the Ballona Rancho contained in Commisioner Drummond's letter is not a part of his decision. The matter before the commissioner was the location of the boundaries of Rancho Ballona. Only the boundaries of the rancho were in dispute. The only real concern about the nature of the "inner bay" was expressed by Commissioner Wilson (Joint Appendix pp. 32-34), who would have extended the boundaries of the rancho to include an additional 2000 acres, something that no one wanted. The description of the inner bay, whether an accurate or

---

13/ Whether the statement would be *res judicata* in a litigation involving the "inner bay" located north easterly of the islands is not a question for this case. The "nine-tenths of Hancock's 'inner bay' [shown] as salt marsh and mud flats" (see Solicitor General's Brief p. 10) are not a part of this litigation.

inaccurate description, would not affect the location of the boundaries of the rancho. Such comments do not have a res judicata or collateral estoppel effect. "The principle of res judicata does not apply to points which come under consideration only collaterally or incidentally," (*Norton v. Larney* (1925) 266 U.S. 511, 517).

Further, a decision beyond the jurisdiction of an administrative officer has no *res judicata* effect. The finality of a decison of the General Land Office "proceeds upon the assumption that the matter determined is within the jurisdiction of the Land Department." Whether or not the matter is within the department's jurisdiction is a judicial decision. (*Borax Consolidated Ltd. v. City of Los Angeles* (1935) 296 U.S. 10, 17-18)

It is not unprecedented for persons to argue that decisions are final, regardless of the jurisdiction of the body rendering the decision. This argument was made with respect to a United States grant of land in *Wilcox v. Jackson* (1839) 13 Pet. (38 U.S. 498. At page 511 the court discusses the argument that the issuance of a "claim of preemption" to an army fort was "conclusive and irreversible" as the statute did not allow an appeal from the decision of General Land Office register. Of this argument the court said:

> "This proposition is true in relation to every tribunal acting judically, whilst acting within the sphere of their jurisidiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse

> of this is true in relation to the judgment of any Court acting beyond the pale of its authority . . . 'But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.' "

Petitioner cites several cases on pages 36 and 37 of its brief regarding the conclusive effect of a land department decision. We suggest those cases, and the quotations from them, must be read in context. For the cases also express exceptions to the rule quoted. For example, ***Johnson v. Drew*** (1898) 171 U.S. 93 also says at page 100:

> "In other words, the action of the land department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

The authority of the commissioners under the Act of 1851 was to separate the land already privately owned from that available for sale or donation to the new settlers by determining the boundaries of the privately owned land. There was no jurisdiction to determine whether easements or encumbrances existed - whether private or public - within the privately owned lands. To the extent the commissioner intended to make such a decision when he described the geography of the "inner bay" (and we do not think he had such intent) he was acting beyond his jurisdiction, and his decision in this respect was void.

CONCLUSION

This case involves a claim of a tideland easement by the State of California and the City of Los Angeles. The State and the City are not making a claim to title. Though a "broad" easement, it does not allow the State or City to make the numerous profitable uses they may make of tidelands to which they hold title. This court has recognized that the existence of an easement of navigation, fishing and commerce (the "public trust" easement) does not take all valuable rights in a property, and may exist even though title is in a private person. This court has recognized, by denial of petition for writ of certiori in ***Lyon v. California*** 454 U.S. 865, that the preservation of property for public trust purposes and under the claim of a public trust easement is not a taking of the property.

It has also been established that Congress, when it adopted the Act of 1851, did not intend to confer any special or exalted status on land patented under the act. Such land, and the owners thereof, are to be treated the same as other land and other owners.

Generally, the property rights, duties, and disabilities of owners of land patented by the United States is determined by state law. Only the fact of the transfer from the United States and the boundaries of such land are determined under federal law.

Petitioner essentially argues that two classes of land exist in California, one subject to California law and one, derived from Mexican grants, which has greater rights and lesser disabilities. We do not think this is true. If lagoons

and estuaries subject to the tides are generally subject to the public trust easements when privately owned, so should lands such as the Ballona Lagoon. This is the general rule applicable to federally patented lands; it should be applicable here.

Respectfully submitted,

IRA REINER, City Attorney

GARY R. NETZER,
Assistant City Attorney

NORMAN L. ROBERTS,
Assistant City Attorney

By: GARY NETZER

Attorneys for Respondent

CITY OF LOS ANGELES